IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.11 OF 2002
AND
CROSS OBJECTION

1. Satyawati Tukaram Salgaonkar,
2. Ashok Tukaram Salgaonkar,
3. Smt. Ashok Salgaonkar,

All three residing at
Ansabhat, Mapusa, Bardez, Goa

4. Kishore Tukaram Salgaonkar,
Laxmi Bus Service Near Portuguese
Church, Dada V.B. Mumbay.
5. Shoba Goltekar alias
Shoba Ankush Goltekar,
6. Shri Goltekar alias Ankush
Keshav Naik Goltekar,
both appellants No.5 and 6 residing
at Duler, Mapusa, Bardez, Goa.
7. Uday Tukaram Salgaonkar,
married, and his wife;
8. Smt. Uday Salgaonkar
both residing at Tarchi Batty,
Siolim,
9. Anand Tukaram Salgaoncar,
10. Smt. Anand Salgaoncar alias
Lagan Anand Salgaoncar,
both residing at Tarchy Batty,
Siolim, Goa.
11. Smt. Shabi Salgaoncar alias Shali
Salgaoncar
12. Shri Shabi Salgaoncar alias Kurana
Shabi Naik Salgaoncar, both
residing at Tarchy Batty, Siolim, Goa.

13. Yogeshwar Tukaram Salgaoncar
residing at Ansabhat, Mapusa,
Bardez, Goa.

14.Shri Ramakant Dhargalkar,
15.Smt. Ramakant Dhargalkar,
both residing at Tarchy Batty,
Siolim, Goa.
16.Shri Nishikant Sonu Dhargalkar,
17.Smt. Nishikant Dhargalkar,
both residing at Tarchy Batty,
Siolim, Bardez, Goa. ..... Appellants.

V/s.

1. Shri Maximiano Donato Zuzarte
retired, so of Donato Bocarro,
resident of Sabnta Cruz Ilhas, Goa
presently residing at Portugal,
represented by his constituted attorney
Miss Maria Santana Lilia Zuzarte
Bocarro, r/o. Siolim, Bardez, Goa.

2. Smt. Kishore Salgaoncar
residing at Laxmi Bus Service,
Near Portuguese Church,
Dadar V.B. Mumbai,
3. Sudhir Harmalkar,
4. Shri Harmlkar,
respondent Nos. 3 and 4 both
residing at Poilem Oxel, Siolim
Bardez, Goa.
5. Sindhu Diukar
6. Shri Diukar,
respondents No.5 and 6 both
residing at Sankwadi, Bardez, Goa. ..... Respondents.

Mr. M. B.D'Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for the appellant.

Mr. A. F. Diniz, Advocate for respondent No.1.

CORAM : P.V. KAKADE, J.

DATE : 11TH AUGUST, 2006.

ORAL JUDGMENT :

Heard the learned Advocates for both the parties. Perused the records. The appellants have filed this appeal against the Judgment and Order dated 29th September, 2001, passed by the Addl. Civil Judge, Senior Division, Mapusa, decreeing the suit of the plaintiff, declaring that the plaintiff is the owner of the properties described as first and third properties. It was further declared that the name of Tukaram Salgaonkar entered in Survey Nos.175/29 and 175/25 was wrongly recorded and hence to be deleted. The suit of the plaintiff in respect of properties numbers second and fourth, however, was held to be dismissed. Further, it was directed that the defendants were required to hand over vacant possession of the suit properties to the plaintiff or the defendants were required to put the plaintiff in possession of the suit properties.

2. In the course of hearing of the appeal, it was transpired that the plaintiff did not press for decree with regard to properties number second and fourth. However, the plaintiff in her evidence, in examination in chief, categorically stated that the suit pertained two properties, namely first and third properties and did lay her claim over the suit properties number third and fourth. For that purpose, the learned trial Judge was of the view

that the relief in that regard could not have been adjudicated and accordingly recorded the finding to the effect that "finding withheld". In fact, he should have recorded the reasons giving reference to the evidence of the plaintiff and recorded his finding either in the affirmative or in the negative and only finding recorded as "finding withheld" is contrary to law. At any rate, such an aspect is not pressed by both the parties, nor should be made issue for dispute in view of the plaintiff's own evidence.

3. It was further submitted on behalf of the appellants that when there was no plea for possession of the suit properties; nor there was averment nor the prayer in the plaint, still the learned Judge thought it fit to pass decree for possession with direction that the defendants shall put the plaintiff in possession of the suit property which, according to the learned Counsel for the appellants, was contrary to law. In this regard, it was submitted on behalf of the respondents that in fact, the plaintiff had sought amendment of the plaint to incorporate her plea for possession in the plaint itself. But the application came to be rejected. Perusal of the record shows that an application was made for amendment of the plaint, after final arguments were advanced and hence came to be rejected. Inspite of such rejection, decree for possession appears to have been passed which is the bone of contention between the parties and gave rise to the

submission on behalf of the respondents that the suit should be remanded after allowing the amendment for adjudication on the limited issue of possession of the properties.

The learned Counsel for the appellants submits that apart from these aspects, the suit is liable to be discarded on the ground that there is no proper identification of the properties and on that ground itself, the temporary injunction was refused to the plaintiff. In my considered view, the position which prevailed at the time of interim relief cannot be taken into account at this stage. In fact, it must be noted that in order to achieve exhaustive justice to the parties, all the contentions should be allowed to be raised so as to bring finality to the dispute between the parties. This is especially so when the decree for possession has been passed inspite of the fact that the application for amendment of prayer of the plaintiff was rejected which, in my view, is patently an illegality committed by the learned trial Judge. If he came to the conclusion that the decree for possession was to be withheld, in that case, proper course for him should have been to allow the application for amendment and give opportunity to both sides to lead evidence in that behalf and then adjudicate the issues according to law. In the facts and circumstances, the matter requires remand for limited purpose on the question of possession inspite of the fact that the contention of the appellants shall be left open to the effect that the

identification of the properties is not proper. Needless to mention that the question of limitation would not arise while deciding the issue of possession and amendment thereof.

4. In the result, I hold that the matter deserves to be remanded. Hence, the Judgment and Order passed by the learned trial Judge in Special Civil Suit No. 303/89/Sr/I of the First Civil Judge, Sr. Division, at Mapusa is, hereby, set aside. The trial Court is directed to allow the application for amendment of the plaint and, thereafter, to allow the defendants to file additional written statement, if any, and then allow to raise the issue limited to the purpose of possession of the property and adjudicate the same and then dispose of the suit according to law.

All such exercise shall be completed within six months from the date of receipt of writ of this Court. With these directions, the appeal stands disposed of with no order as to costs. It is clarified that pending the suit before the lower Court, the parties shall maintain status quo as of today. Under the circumstances, cross objection stands disposed of with no order as to costs.

P.V. KAKADE, J.

ssm.